UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAENICO DANGELO JOHNSON,

Defendant.
_____/

CASE No. 1:19-CR-99

HON. ROBERT J. JONKER

ORDER DENYING UNTIMELY MOTION TO SUPPRESS

INTRODUCTION

An initial pretrial conference in this matter was held on July 22, 2019. (ECF No. 12). All pretrial motions were due within 21 days of that conference—that is, by August 12, 2019—as provided by Court Order (ECF No. 7) under the authority of Rule 12(c). This 21-day period is the standard deadline imposed in criminal cases within this district. On August 27, 2019, Defendant filed a Motion (ECF No. 21) seeking to suppress evidence of a firearm seized during a March 29, 2019 search of his person. A corrected motion was filed on August 29, 2019. (ECF No. 24). Plainly, neither motion was filed within the requisite time period.

On August 29, 2019, the Court ordered the defense to show cause why the motion to suppress should not be dismissed as untimely. (ECF No. 25). Defendant, through counsel, does not dispute that the pending motions are untimely, but the defense argues it can show good cause, under Rule 12(c)(3), for the untimely filing. For the reasons that follow, the Court concludes the defense has not demonstrated good cause and **DENIES** the defense motion as untimely.

DISCUSSION

1. Timeliness of Motion

The defense agrees the motion to suppress was untimely but suggests that counsel was operating under the mistaken belief that the motion would be timely as long as it was filed in advance of the final pretrial conference.

Under FED. R. CRIM. P. 12(c)(1) "[t]he Court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial." *Id.* Accordingly, "Rule 12(c) permits the court to set a deadline for pretrial motions, and it prompts the court to do so early in the process." Wright & Leipold, *supra*, at § 192. This case had a deadline for pretrial motions under the Order Scheduling Progression of Case (ECF No. 7). It was set consistent with longstanding practice in the district. Accordingly, the deadline for filing Rule 12(b) motions was set by that Order—21 days from the initial pretrial conference.

The Court in this case acted under the Rule 12(c) authority in setting its standard deadline for Rule 12(b) motions at 21 days after the initial pretrial conference. The reasons for doing so are evident. Completing motion practice before final pretrial promotes efficiency, prevents waste of time and resources, and ensures hearings proceed as scheduled. Because the motion to suppress was not filed within this period, the motion is untimely, as the defense candidly admits.

2. The Defense Has Not Shown Good Cause to Excuse the Untimeliness

"A Court may refuse to consider motions that are filed after the deadline that was set, but it is not required to do so." Wright & Leipold, *supra* at § 192. Under Rule 12(c)(3), "[i]f a party does not met the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court

may consider the defense, objection, or request if the party shows good cause." FED. R. CRIM. P. 12(c)(3).

> Good cause is a flexible standard heavily dependent on the facts of the particular case as found and weighed by the district court in its equitable discretion. At a minimum, it requires the party seeking a waiver to articulate some legitimate explanation for the failure to timely file. *See, e.g., United States v. Acox,* 595 F.3d 729, 731 (7th Cir. 2010); *see also United States v. Turner,* 602 F.3d 778, 787 (6th Cir. 2010) (affirming a district court's decision that an attorney's failure to file a motion as requested by a defendant is not good cause). Generally, if the failure to timely file occurred as a result of a lawyer's conscious decision not to file a pretrial motion before the deadline, the party seeking a waiver will not be able to establish good cause."

United States v. Walden, 625 F.3d 961, 965 (6th Cir. 2010).

The showing of good cause under Rule 12(c)(3) "'often requires developing and analyzing facts' to assess whether the defendant can justify the late filing . . . and prejudice." *United States v. Edmond*, 815 F.3d 1032, 1043 (6th Cir. 2016) (citing *Soto*, 794 F.3d at 655, *Davis v. United States*, 411 U.S. 233, 244-45 (1973)), *judgment vacated on other grounds*, 137 S. Ct. 1577 (2017). "[M]ost courts . . . have required a showing of both cause and prejudice." *United States v. Campos*, No. 5:17-cr-55-DCR-REW, 2018 WL 1406614, at *2 (E.D. Ky Feb. 23, 2018) (Wier, M.J) (citing *United States v. Gonzalez*, 81 F. Supp. 3d 1212, 1223 (D.N.M. 2015). The defense has shown neither cause nor prejudice here.

A. Cause

With respect to cause, courts have held that "counsel's inadvertent failure to raise a suppression argument before the district court does not in itself constitute good cause warranting relief from" a Rule 12(c) motion. *United States v. Augustine*, 742 F.3d 1258, 1266 (10th Cir. 2014). And there is nothing else here that would show good cause. Defense counsel does not argue, for example, that the materials necessary to craft the suppression motion were not made

available in time to file by the deadline. Nor could the defense make such a showing, as it appears the materials were provided to him well in advance of that deadline. Even if defense counsel needed more time he could have, but did not, seek an extension for filing a Rule 12(b) motion.

While defense counsel argues the defense was prepared to proceed on the original schedule, the untimely filing made such a progression impossible. Under local rule the government had twenty-eight days within which to file a responsive brief. W.D. MICH. LCRIMR 47.1(c). 28 days from the filing of the original motion to suppress in this case would have fallen on the day trial in this matter was set to begin, September 24, 2019. Adhering to this schedule would mean going through with a final pretrial conference with a pending motion that was not yet fully briefed. Then both sides, this Court, and a jury of twelve individuals, would have arrived on the date of trial not certain if trial would proceed.

The Court appreciates defense counsel's candor, but the Court must also ensure that counsel who come before this Court understand that deadlines matter. Simply falling on one's sword isn't an automatic ticket to delayed consideration.

B. Prejudice

Furthermore, the Court discerns no prejudice here because the defense has failed to demonstrate the suppression motion has prima facie merit.

Terry v. Ohio, 392 U.S. 1 (1968), established that an officer may detain an individual without an arrest warrant on the basis of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that instruction." *Id.* at 21. In such situations, the Court evaluates the "reasonableness" of the officers' suspicion based upon the identified facts and the manner in which the officer conducts his investigation. When a police officer "observes unusual conduct which leads him reasonably to conclude in light of his

experience that criminal activity may be afoot . . . .” he is permitted to detain an individual in order to investigate further. *Id.* at 31. *Terry* permits detention when there is reasonable suspicion to believe that the individual may be armed and dangerous or engaging in criminal activity. The Supreme Court’s holding in *Terry* has also been applied to uphold investigative stops of vehicles when police have reasonable suspicion that the individuals inside the vehicle may be involved in criminal activity. *See United States v. Sokolow*, 490 U.S. 1 (1989). Reasonable suspicion is determined by the totality of the circumstances. *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Cortez*, 449 U.S. 411 (1981).

Taking the facts as portrayed by the defense at face value, the stop of Defendant in this case passes muster in *Terry* on at least a prima facie basis. The officers observed behavior and had other information that created a reasonable suspicion that “criminal activity may be afoot.” *Terry*, 392 U.S. at 30. Officers were investigating a report of a stolen vehicle. They found a vehicle matching the description with Defendant inside along with several others. When approaching the vehicle, officers could smell burnt marijuana emanating from the vehicle and saw marijuana in plain view near where Defendant was sitting. All this is as was detailed in the defense motion, and on a prima facie basis supports a *Terry* stop and pat down.

Defendant’s basic position is that an evidentiary hearing would reveal that the owner of the car decided not to press charges before officers completed their investigation. But even assuming that’s true, the officers were still responding in a fluid situation. Reasonable suspicion of criminal activity does not evaporate into thin air the instant a victim or potential victim decides not to press charges. Officers may reasonably complete their work in responding to an initial call.

CONCLUSION

The defense has shown neither cause nor prejudice to constitute good cause under Rule 12(c)(3) to excuse the untimely filing of the motion to suppress. **ACCORDINGLY, IT IS ORDERED** that Defendant's Motion to Suppress (ECF No. 21) and Corrected Motion to Suppress (ECF No. 24) are **DENIED** as untimely.

Dated: September 4, 2019

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE